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No. 90-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

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QUESTION PRESENTED

The Respondent United Mine Workers of America does not agree with Petitioner's statement of the question presented. Properly, the question presented is as follows:

> Did the court below correctly decide, in light of the broad judicial deference required by *Chevron*, that one of its prior decisions, applying a standard of review inconsistent with that established by *Chevron*, did not require reversal of the agency's reasonable construction of its governing statute?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
I. THE DECISION BELOW, AFFIRMING AN AGENCY'S REASONABLE CONSTRUCTION OF ITS GOVERNING STATUTE, PRESENTS NO CONFLICT WITH THIS COURT'S DECISIONS NOR ANY IMPORTANT QUESTION OF FEDERAL LAW	5
II. THERE IS NO CONFLICT OF CIRCUITS	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9, 10
Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C.Cir. 1990) ..... *passim*
Davis v. United States, 417 U.S. 333 (1974) 7
District 6, UMWA v. United States Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C.Cir. 1977) ..... *passim*
Flowers v. U.S., 764 F.2d 759 (11th Cir. 1985) 8
LeVick v. Skaggs Companies, Inc., 701 F.2d 777 (9th Cir. 1983) 9
Rushton Mining Co. v. Morton, 520 F.2d 716 (3rd Cir. 1975) 5, 7, 12, 13, 14
UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) 4
UMWA v. Clinchfield Coal Co., 9 FMSHRC 1276 (1987) 4
UMWA v. Clinchfield Coal Co., 8 FMSHRC 1310 (1986) 4
UMWA v. Clinchfield Coal Co., 6 FMSHRC 1782 (1984) 3
UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317 (1986) 9

STATUTES:

Federal Coal Mine Health and Safety Act of 1969, § 110(a), Pub. L. No. 91-173, 83 Stat. 758 ..... 8, 13
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*:
Section 103(k), 30 U.S.C. § 813(k) 2
Section 104(d), 30 U.S.C. § 814(d) 3
Section 105(d), 30 U.S.C. § 815(d) 11
Section 106(a), 30 U.S.C. § 816(a) 11
Section 107(a), 30 U.S.C. § 817(a) ..... *passim*
Section 111, 30 U.S.C. § 821 ..... *passim*

LEGISLATIVE HISTORY:

S. Rep. No. 181, 95th Cong., 1st Sess. (1977) 4, 5, 7, 11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:

	Page
Code of Federal Regulations, 29 C.F.R. § 2700.35	2
R. Stern & E. Grossman, *Supreme Court Practice* (1986)	8
Funk and Wagnalls New Standard Dictionary of the English Language (1945)	6

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

The Respondent, the International Union, United Mine Workers of America, (hereinafter "the UMWA"), submits that the petition for a writ of certiorari to review the order entered by the United States Court of Appeals for the District of Columbia Circuit in this case on February 9, 1990 should be denied. The Union concurs with Petitioner's discussion of the *Opinions Below*, *Jurisdiction*, and the *Statutory Provisions Involved*.

COUNTERSTATEMENT OF THE CASE

On the evening of June 21, 1983, an explosion tore through Clinchfield's McClure mine, located in Dickerson County, Virginia, killing seven miners and injuring three others. Early the next morning, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) arrived at the mine. The inspector issued an order under § 103(k) of the Federal Mine Safety & Health Act and shortly thereafter issued an imminent danger order under § 107(a) of the statute.[1] The two orders prevented all except certain government, company, and union personnel from entering the mine and authorized MSHA to supervise rescue and recovery work. The orders were not terminated until August 8, 1983 and July 18, 1983, respectively.

Within the 90 days provided under the regulations,[2] the UMWA filed an action under the third sentence of section 111 of the Mine Act. That statutory provision provides miners with up to a week's compensation for wages lost when the mine is idled by a closure order issued under § 107 "for a failure of the operator to comply with any mandatory health or safety standards."[3] The

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[1] Section 103(k), 30 U.S.C. § 813(k) (1982), App. 84a, authorizes the issuance of an order following an accident "to insure the safety of any person."

Section 107(a) of the Mine Act, 30 U.S.C. § 817(a) (1982), App. 86a, authorizes the issuance of a closure order where "an imminent danger exists."

[2] 29 C.F.R. § 2700.35.

[3] The third sentence of sec. 111 provides:

> If a coal or other mine or area of such mine is closed by an order issued under section 104 [30 U.S.C. § 814] or § 107 [30 U.S.C. § 817] of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is

UMWA contended that Clinchfield's violations caused the imminent danger which resulted in the § 107(a) order. Clinchfield moved for summary decision contending the statutory entitlement did not apply because the § 107(a) imminent danger order did not charge the operator with a violation of a mandatory standard. The administrative law judge denied the motion pending the outcome of MSHA's investigation into the cause of the explosion.

On March 26, 1984 upon concluding its investigation, MSHA cited the operator with violations of five mandatory safety standards. MSHA also determined that Clinchfield's "unwarrantable failure" to comply with these standards caused the explosion.[4] Clinchfield did not challenge the violations or the findings contained therein and paid the $50,000 in penalties assessed by MSHA.

In July 1984, the administrative law judge granted Clinchfield's renewed motion for summary decision. The judge recognized that MSHA had determined the explosion to have been caused by the operator's violations and expressed surprise that MSHA had not decided to amend the § 107(a) order to include the violations.[5] The judge nevertheless denied the miners' compensation claim because the § 107(a) imminent danger order, upon which their claim was based, did not itself allege a violation. *UMWA v. Clinchfield Coal Co.*, 6 FMSHRC 1782 (1984) (ALJ Moore), App. 77a.

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final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (1982), App. 87A.

[4] Section 104(d), 30 U.S.C. Section 814(d) 1982, App. 85a, requires the issuance of citations and orders when MSHA finds violations caused by the "unwarrantable failure" of the operator to comply with mandatory standards.

[5] However, as the court below noted: "the power to modify evidently ceases after an order has been terminated." 895 F.2d at 776, App. 6. (Citing to Labor Brief 14, n.10, J.A. 116).

The Federal Mine Safety & Health Review Commission granted the Union's petition for review and subsequently reversed the administrative law judge. The Commission determined that the statute's requirement that the imminent danger order be issued "for a failure of the operator to comply with any mandatory health or safety standards" was satisfied when the conditions which triggered the imminent danger order were later determined by MSHA to be caused by the operator's violations. *UMWA v. Clinchfield Coal Co.*, 8 FMSHRC 1310 (1986), App. 50a.

On remand to the administrative law judge, the parties stipulated to the existence of the required causal relation between the violations and the idling of the mine. Based on the stipulations, Commission ALJ Melick ruled that the miners were entitled to compensation and interest. *UMWA v. Clinchfield Coal Co.*, 9 FMSHRC 1276 (1987) (ALJ Melick), App. 39a. The Commission reaffirmed its inital ruling in a subsequent decision ordering payment of a week's wages plus interest. *UWMA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 App. 17a.

Clinchfield appealed to the U.S. Court of Appeals for the D.C. Circuit which unanimoulsy affirmed the Commission. *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773 (D.C. Cir. 1990), App. 1a. The Court saw "nothing unreasonable in the Commission's reading of the word 'for' to require one week compensation where there is a 'causal nexus' between a section 107(a) withdrawal order and a health or safety violation that is cited later." 895 F.2d at 775 App. 4a. Furthermore, the court noted that the normal deference due the Commission was heightened in this case since the Commission's interpretation was in accord with the position urged by the Secretary of Labor, who filed an amicus brief with the Commission in support of the UMWA. 895 F.2d at 776. App. 5a.[6]

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[6] S. Rep. No. 95-181, 95th Cong., 1st Sess. 49, U.S. Code Cong. & Admn. News 1977, p. 3401, 3448 (Secretary's interpretation of the Mine Act should be given weight by the courts).

The Court was also struck by the odd results that would occur under the interpretation urged by Clinchfield. If Clinchfield's position were adopted, miners could not get the week's worth of compensation provided by § 111 unless the MSHA inspector cited the violation at the time he issued the withdrawal order. The Court recognized that this is often impossible where the imminent danger required by § 107 has already materialized in an accident. In such cases MSHA often had to conduct a lengthy investigation before it could determine the violations that led to the accident. The court concluded that Clinchfield's position would "penalize miners in just those cases where safety violations are so severe that they result in a disaster." 895 F.2d at 776. (Quoting from the Secretary's amicus brief). The court also observed that the Commission's construction of § 111 furthered the purpose of that statutory provision by removing a possible deterrent to miners reporting imminent dangers or to the inspector promptly issuing a withdrawal order.[7]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, AFFIRMING AN AGENCY'S REASONABLE CONSTRUCTION OF ITS GOVERNING STATUTE, PRESENTS NO CONFLICT WITH THIS COURT'S DECISIONS NOR ANY IMPORTANT QUESTION OF FEDERAL LAW

The decision of the Court of Appeals implicates none of the considerations favoring grant of the writ of certiorari articulated by this Court's Rule 17. Rather, the decision below is a routine application of the standard of deference this Court has stated should be applied to rea-

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[7] S. Rep. *supra* at 47, noting that § 111 compensation will "remove any possible inhibition on the inspector in the issuance of closure orders". *Cf. Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975), relying on similar incentive effects on miners and inspectors in construing predecessor to § 111.

sonable constructions of a statute by the agency charged with implementing it. In this case, as the court noted, the deference due the Review Commission was heightened by the fact that the Commission's interpretation was consistent with the position taken by the Secretary of Labor. 895 F.2d at 776, App. 5a.

The Court upheld the Commission's determination that an imminent danger order is issued "for a failure of the operator to comply with any mandatory health or safety standards" when there is a "causal nexus" between the imminent danger and a health or safety violation that is cited later. Interpreting "for" to denote a causal connection is entirely reasonable and indeed is an interpretation found in a standard dictionary definition of the word.[8] Clinchfield argues for a construction that would limit third sentence compensation to those situations in which the closure order itself charges the operation with a violation. Clinchfield has not demonstrated that the Commission's interpretation is unreasonable. All it has done is offer an alternative way of interpreting the "for a failure" phrase.

The court below found it significant that Clinchfield's interpretation would penalize miners who were idled because the employer's violations were so severe that they resulted in a disaster. Under the restrictive interpretation urged by Clinchfield, miners would only be entitled to third sentence compensation when MSHA was able to describe the violation as part of the imminent danger order. The Secretary of Labor, who is charged with enforcing the Act, explained why this is frequently impossible:

> MSHA often cannot, and should not, specify the operator's violations on a withdrawal order issued

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[8] For: "Because or by reason of; on account of. *Funk and Wagnalls New Standard Dictionary of the English Language*, 1st Ed. 1945."

> immediately following a mine disaster. Most importantly, immediately after the disaster, it frequently is too dangerous for anybody to enter the mine to determine exactly what happened. Further, MSHA usually must devote its resources to rescuing miners and recovering the affected areas of the mine before it can even begin its accident investigation.

895 F.2d at 776. App. 5a.

The Commission's construction of § 111 holds that miners are entitled to compensation if MSHA subsequently determines that the imminent danger which triggered the closure order was a result of operator violations. The court concluded that such an approach "makes sense" especially in light of the legislative history indicating Congress' desire that miners not be deterred from reporting violations, and that inspectors not be inhibited from issuing withdrawal orders because of a concern that miners might lose wages as a result. 895 F.2d at 776, citing S. Rep. No. 95-181, 95th Cong., 1st Sess. 47 (1977); and *Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975), App. 5a-6a.

Clinchfield contends that an earlier decision by the D.C. Circuit, *District 6, UMWA v. United States Department of Interior Board of Mine Operations Appeals*, 562 F.2d 1260 (D.C.Cir. 1977) ("District 6"), precludes the award of compensation below and that the court's failure to apply that decision violates important principles of *stare decisis*. Contrary to Clinchfield's assertions, the decision below does not reflect a "casual overturning of many years of precedent," nor are there any important principles of *stare decisis* for this Court to address. Even if Clinchfield's position was well founded (which it is not) the issue would simply boil down to a conflict within a circuit. This is not a problem that merits granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). As Justice Harlan once wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable con-

flict since such differences are deemed an intramural matter to be resolved by the Court of Appeals itself." [9]

In any event, the decision below does not undermine principles of *stare decisis*. *Stare decisis* means that like facts will receive like treatment in a court of law. *Flowers v. U.S.*, 764 F.2d 759 (11th Cir. 1985). The factual context of the decision below differs from that found in *District 6*.

District 6 arose under § 110(a) of the 1969 Coal Act, predecessor to § 111 of the current statute.[10] That Act allowed miners to obtain up to a week's compensation when they were idled by an order issued under § 104 of this title "for an unwarrantable failure of the operator to comply with any health or safety standard." In *District 6* the Secretary of Interior issued an imminent danger order but never made the requisite findings that the operator unwarrantably failed to comply with a mandatory health or safety standard. The Interior Board of Mine Operations Appeals ("IBMA") and the Court of Appeals rejected the Union's attempt to prove the existence of the underlying violation so as to obtain third sentence compensation.

The decision below on the other hand, involves the 1977 Mine Act. Under that statute, the week long compensation entitlement has been broadened. Instead of being restricted to orders issued for an operator's "unwarrantable failure" violations, third sentence compensation is now triggered by an order issued simply for a failure of the operator to comply with any mandatory health or safety standard. More importantly, in this case, unlike *District 6*, MSHA made the requisite finding of violation.

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[9] Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 552 (1958), quoted in R. Stern and E. Grossman, *Supreme Court Practice*, 5th Ed. 276 (1986).

[10] Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742.

The Commission found such distinction significant and explained that here, unlike the situation in *District 6*, the Secretary of Labor, as enforcer of the Act, had initiated both the closure order and the allegations of violation. The UMWA, therefore, was not asking the Commission to make findings that were more properly the responsibility of the Secretary. The problem in *District 6* the Commission explained, was that the Union, instead of the agency, was attempting to prove the underlying violations. This amounted to the Union usurping the agency's prosecutorial discretion.[11] The court below found the Commision's reliance on this distinction a sufficient explanation for its failure to follow *District 6*. 895 F.2d at 778, App. 9a-10a.

Although the court below recognized the distinguishing features of the *District 6* case, it did not rely on those distinctions in explaining its refusal to reverse the Commission on the basis of that opinion. Rather, the court engaged in an extensive analysis of the binding effect, if any, of the *District 6* opinion in light of this Court's intervening opinion in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("Chevron").[12]

In *Chevron* this Court articulated a two step analytical framework that courts should employ when reviewing an agency's construction of its governing statute. The first job of the court is to determine "whether Congress has *directly* spoken to the *precise* question at issue." 467 U.S. at 842-43 (*emphasis added*). If so, then the court "must give effect to the unambiguously expressed intent

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[11] The Commission's explanation was contained in its decision in *UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1328-29, n.5, App. 57a, 73a-74a, which was incorporated by reference in its *Clinchfield* decision, 8 FMSHRC at 1311, App. 5a.

[12] It was appropriate for the court to reexamine existing precedent which has been undermined by a subsequent Supreme Court decision, *LeVick v. Skaggs Companies, Inc.*, 701 F.2d 777, 778 (9th Cir. 1983).

of Congress." *Id.* This Court cautioned however that in those situations where Congress has not addressed the precise issue, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 844.

The essence of Clinchfield's petition is that the court below erred when it determined that the *District 6* opinion was not based on a conclusion that Congress had spoken directly on the precise question at issue. Clinchfield argues that the *District 6* opinion reflects just such a conclusion and that the court below should have imposed the *District 6* interpretation on the Commission, rather than affirming the Commission's alternate, reasonable construction of the statute.

In spite of Clinchfield's arguments to the contrary, the conclusion reached by the court below, that *District 6* did not bind the Commission, is the correct one. As the decision below observed, the *District 6* court applied a narrower concept of judicial deference than what *Chevron* now plainly requires. The *District 6* court did not seek to determine whether Congress had unambiguously expressed its intent on the precise question in issue. That court was simply engaged in determining "how the legislature would have decided the specific issue if it had been specifically addressed by the legislature." *Clinchfield v. FMSHRC*, 895 F.2d at 777, App. 8a, quoting *District 6*, 562 F.2d at 1268 (Leventhal, J. concurring).

Although the *District 6* court struggled to determine "which interpretation Congress intended," *id.* this is not the same thing as making a finding that Congress clearly resolved the issue and, as the court below explained, "it leaves the Commission free to choose the other [interpretation] if reasonable." 895 F.2d at 778, App. 9a.[13]

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[13] Clinchfield complains that the court below ignored Clinchfield's argument that the Commission violated well settled principles safeguarding against improper retroactive application of new agency

Indeed, as noted by the court below, even the *District 6* court appeared to concede the reasonableness of the result reached in this case. Although it came to a different conclusion, the court observed that to construe § 111's predecessor as allowing payment even in absence of an order specifying violations would not be "completely outside the language of the statute . . . nor be one inconsistent with some of the general objectives of the Act." 895 F.2d at 778. App. 9a quoting 562 F.2d 1264-65. The court below therefore concluded that "affirmance of the Commision is consistent with *District 6*." (*Id.*).[14]

Even assuming *arguendo* that the court below incorrectly analyzed the *District 6* opinion, there is still no justification for granting certiorari. Although Clinchfield argues that there is "an important issue involving the imposition of unanticipated and unwarranted liability . . .", (Petition at 8) it is unclear to what extent the decision below will result in future liability for Clinchfield or any other mine operator. Clinchfield fails to explain that operators are only potentially liable for third sentence compensation upon MSHA's determination that conditions precipitating an imminent danger order resulted from the operator's violations. This is because operators have the ability under § 105(d), 30 U.S.C. § 815(d), to challenge any MSHA finding that a violation occurred.[15] A successful challenge to MSHA's finding of

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policy. (Petition at 12 n.12). The court properly ignored this argument since Clinchfield never raised it before the agency and, as the UMWA argued below, the court was therefore precluded from considering it under 30 U.S.C. section 816(a).

[14] Clinchfield argues that Congress' passage of the 1977 Mine Act implies approval of the *District 6* interpretation. (Petition at 14, n.4). The legislative history of the Mine Act contains no mention of the *District 6* opinion even though it does contain examples where Congress remarked approvingly about cases with which it agreed. *See i.e.* S. Rep. *supra* at 31, 32.

[15] Section 105(d) provides, in part:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest

violation defeats the third sentence requirement that the order be issued "for a failure of the operator to comply with any mandatory health or safety standards."

Even an ultimate determination that the violation occurred will not automatically result in an imposition of liability under the third sentence of § 111. This is because the Commission has determined that there must also be a "causal nexus" between the violation and the imminent danger which triggered the withdrawal order. Operators will have the opportunity to challenge any allegation that such "causal nexus" exists.

In short, Clinchfield's liability in this proceeding is only partly a result of the Court's refusal to be bound by the *District 6* opinion. Of equal consequence is Clinchfield's acquiescence in the Secretary's determination that Clinchfield's violations bore a causal connection to the explosion.[16]

II. THERE IS NO CONFLICT OF CIRCUITS

Petitioner Clinchfield contends that the decision below "conflicts in principle" with the decision of the Third Circuit in *Rushton Mining Co. v. Morton*, 520 F.2d 716

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the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

[16] Clinchfield did not challenge the violations issued as a result of MSHA's investigation and the operator stipulated to the causal nexus between the violations and the § 107(a) imminent danger order. (Petitioner's statement of the case at 5-6).

(Petition at 8, 11). Beyond the fact that the decision in *Rushton* also concerned a compensation claim, the two cases bear little similarity. The *Rushton* case most certainly does not present a conflict between circuits. Instead of the week's worth of compensation provided under the third sentence, the *Rushton* miners were seeking the limited payment provided by the first two sentences of § 110(a), which was the 1969 Coal Act's compensation provision.[17]

The issue before the *Rushton* court was "whether the Board may order compensation under [30 U.S.C.] § 820 (a) for miners idled by a withdrawal order which has been vacated subsequent to such loss of work."[18] 520 F.2d at 717. The court ultimately concluded that the limited compensation provided by the first two sentences of § 110(a) did not depend on the issuance of a valid withdrawal order.

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[17] Section 110(a) provided in relevant part:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 110(a), 83 Stat. 758.

Entitlement under the analogous provision of the current statue has been broadened so that compensation is triggered by withdrawal orders under sections 103 and 107 as well as section 104. The current compensation provision is set forth in its entirety at App. 86-87a.

[18] The reference to "Board" is a reference to the Interior Board of Mine Operations Appeals which decided cases under the 1969 Coal Act.

Since the *Rushton* miners were not claiming the week's compensation provided by the third sentence, the court never had occasion to discuss the meaning of the requirement that the withdrawal order be issued "for an unwarrantable failure of the operator to comply with any health or safety standard." The *Rushton* analysis of third sentence compensation was limited to the court's observation that compensation was required under that provision only when the order was "final." The court concluded that the lack of a similar finality requirement in the first two sentences meant that the miners were still entitled to the limited compensation provided therein, even when the withdrawal order idling the miners was subsequently vacated.

Thus it is evident that the *Rushton* case, dealing with an entirely different issue, poses no conflict with the decision below, even "in principle." Indeed the court below relied on *Rushton* in concluding that the Commission's decision was consistent with the legislative history. 895 F.2d at 776, App. 5a.

CONCLUSION

The Court of Appeals correctly applied this Court's policy of deference to any agency's construction of its governing statute. The decision did not violate principles of *stare decisis* nor did it pose a conflict with any other circuit. There is no reason for granting the writ.

Respectfully submitted,

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